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No. 441

In the Supreme Court of the United States

OCTOBER TERM, 1958

MELVIN TANZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3–4; R. 177–178) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1958 (Pet. App. 5; R. 179). On September 12, 1958, Mr. Justice Douglas entered an order extending the time for filing a petition for certiorari to and including October 13, 1958. The petition for a writ of certiorari was filed on October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court was required to give an instruction on the effect of testimony as to petitioner's

good reputation in the absence of a request for such an instruction.

2. Whether evidence of petitioner's possession of a "narcotics kit" was admissible to rebut petitioner's testimony that he did not use narcotics and had imported the heroin to supply information to customs agents rather than for his own use.

3. Whether the package of heroin admitted into evidence was properly identified.

4. Whether the minimum penalty prescribed by statute for a second offense may constitutionally be increased after conviction for the first offense but before commission of the second offense.

STATUTES INVOLVED

Section 2 (c) of the Narcotic Drugs Import and Export Act, as amended prior to 1956, provided as follows (21 U. S. C. 174):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law, * * * shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. * * *

* * * * *

Section 2 (c) of the Narcotic Drugs Import and Export Act, as amended by § 105 of the Narcotic Control Act of 1956, 70 Stat. 570, approved July 18, 1956, and effective July 19, 1956 (§ 401), provides as follows (21 U. S. C. (Supp. V) 174):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United

States * * * contrary to law, * * * shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

* * * * *

Section 7237 (c) (1) of the Internal Revenue Code of 1954, as amended by § 103 of the Narcotic Control Act of 1956, 70 Stat. 568, provides as follows (26 U. S. C. (Supp. V) 7237 (c) (1)):

For purposes of * * * subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), * * * an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided * * * in—

(A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U. S. C., sec. 174);

* * * * *

For purposes of determining prior offenses under the preceding sentence, a reference to any subsection, section, or Act providing a penalty for an offense shall be considered as a reference to such subsection, section, or Act as in effect (as originally enacted or as amended, as the case may be) with respect to the offense for which the offender previously has been convicted.

STATEMENT

Petitioner was indicted in the District Court for the District of Arizona for importing and bringing into the United States approximately 29½ grains of heroin on July 23, 1956, in violation of the Narcotic Drugs Import and Export Act of 1909, as amended (R. 3). He was found guilty after a jury trial (R. 8). At the sentencing, petitioner admitted that he had been convicted of a violation of the same statute in the same court in 1953 (R. 8–9, 166). He was sentenced as a second offender to the minimum imprisonment of 10 years prescribed by the Act as amended by the Narcotic Control Act of 1956, effective July 19, 1956 (R. 166–169). The court of appeals unanimously affirmed (Pet. App. 3–4). The facts, which are not challenged here, relating to the several trial errors alleged by petitioner are as follows:

1. *Rebuttal evidence.*—On May 31, 1956, customs agent Viles and state officers San Angelo and Heimer stopped petitioner as he was entering the United States from Mexico at Nogales, Arizona, to search him for narcotics (R. 47–48, 85–87). During the discussion that followed, petitioner agreed to cooperate with the officers in arranging for one "Pancho", a suspected large narcotics dealer in Mexico, to enter the United States to make a sale to an agent posing as a customer (R. 48–50, 87). Petitioner was warned that he was not to bring in any narcotics himself (R. 50, 90). Thereafter petitioner made several trips to Mexico, with the knowledge of the agents, to make arrangements with Pancho for the sale. On each occasion he met with the agents on his return and

reported the result of his trip (R. 51–58). During one such meeting, on June 12 or 13, 1956, petitioner, after some five or ten minutes had elapsed, produced from his shoe a small package which he said was a "sample" Pancho had given him to show that he had the "stuff" (R. 54–55, 143). He had not been told to obtain a sample and was again warned not to bring in anything himself (R. 55). On June 19, the agents accused petitioner of "stalling" and of "just using this as an excuse to go to" Mexico (R. 58). On June 22, 1956, agent Viles told petitioner that the deal "was all concluded as far as we were concerned, that I didn't have any confidence in him" (R. 59–60; R. 140, 143). After that date, none of the officers had any further communications with petitioner concerning the Pancho matter (R. 59, 140–141, 148).

On July 23, 1956, customs inspector Milner searched petitioner as he returned from a trip to Mexico and found in his pocket a package later determined (see pp. 6–7, *infra*) to contain 19 capsules of heroin hydrochloride (R. 35), for the importation of which he was arrested and indicted (R. 3).

Petitioner defended on grounds of entrapment, testifying that San Angelo had planned the July 23 trip; that it was part of the original plan to apprehend Pancho; and that the 19 capsules he brought back on that date were another "sample" from Pancho that he was bringing to the agents and were not for his own use (R. 99–101). Petitioner testified on direct examination that, although he had previously done so, he had not been using narcotics for two years prior to his arrest; that he had not had a "fix" on May 31,

1956, the day on which he was first stopped at the border; and that, while he had had a "fix" at Pancho's on one of his trips, he had done so only to gain Pancho's confidence and to make his part in the proposed sale seem "plausible" (R. 86, 97). On cross-examination petitioner admitted, without objection, that he had had a "fix" on each of his trips to Pancho's house on June 4, 12 or 13, 19, and 22, 1956 (R. 111–113). He denied, however, that he had any "narcotics equipment or paraphernalia" of his own during this period (June 1956); that he had turned over a "narcotics kit" to San Angelo or told him that he "wanted to get off the stuff"; or that he had told San Angelo that he had "another kit stashed in a filling station in town" (R. 122–123). In rebuttal for the Government, San Angelo testified, over objection, that in June 1956 petitioner had given him a "narcotics kit" and had told him that he had another kit "stashed in a gasoline station" (R. 138). He also testified that petitioner had admitted that he had just had a "fix" in Mexico when the agents met him for the first time on May 31, 1956 (R. 139).

2. *Identification of exhibit.*—Customs inspector Milner, who made the search of petitioner on July 23, 1956, testified that he found in petitioner's pocket a small package wrapped in paper with a rubber band around it, that he initialled and dated it, kept it in his possession or view for about 15 minutes, and then gave it to agent Viles (R. 35–42). Agent Viles testified that he received the package from Milner, initialled it, kept it until the next morning, and then turned it over to Chief Customs Inspector Flanagan (R. 60–61).

Flanagan testified that he received the package from Viles on July 24, 1956, initialled it, placed it in an envelope with locks and seals, and on July 25, 1956, sent it by registered mail to the United States Customs Laboratory in Los Angeles (R. 78–79). Albert Schneider, a chemist at the Customs Laboratory, testified that he received the package on July 27, 1956; found upon analysis that it contained 19 capsules of heroin hydrochloride, a narcotic drug commonly known as heroin; sealed the package back up; and returned it by registered mail directly to Flanagan (R. 81–82). Flanagan testified that he received the package back from the Laboratory by registered mail on August 9, 1956, placed it in a vault to which only he had access, kept it there until the morning of the trial, and then turned it over, with the laboratory seals still intact, to the Government's attorney (R. 79). The laboratory seals were broken in open court (R. 36) and each of the witnesses identified the package contained therein (Govt. Exh. 2) as the package he had handled (R. 36–37, 60–61, 78, 81).

3. *Character evidence.*—Three character witnesses testified for petitioner. His employer of a year testified that petitioner's reputation as a law-abiding citizen was good "as far as I know." He had never discussed petitioner's reputation with anyone other than his partner and had heard that petitioner "had been in some kind of trouble" a "couple of years ago" (Behar, R. 128–129). Petitioner's landlord of six or seven years testified that "As far as I know he had a good reputation." He knew nothing about the pending narcotics charge (Shiff, R. 131). The pro-

prietor of a restaurant frequented by petitioner and his friends testified that petitioner's reputation was good. He knew nothing about the narcotics charge (Sohnen, R. 132–133). In the court's charge to the jury, no instruction was given on the effect of character evidence, and none was requested (R. 153–163).

ARGUMENT

1. Petitioner's contention that the trial judge was required to give an instruction on character evidence, even in the absence of a request for such an instruction (Pet. 10–13), finds no support in the cases he cites. Of course, as those cases hold, it is the duty of the court to instruct on all essential questions of law. *Samuel* v. *United States*, 169 F. 2d 787 (C. A. 9); *United States* v. *Levy*, 153 F. 2d 995 (C. A. 3). But, "while there are some subjects upon which counsel may assume that the court will instruct without request, character evidence is not one of them." *Kreiner* v. *United States*, 11 F. 2d 722, 731 (C. A. 2), certiorari denied, 271 U. S. 688; see also *Kinard* v. *United States*, 96 F. 2d 522, 524 (C. A. D. C.); *United States* v. *Corry*, 183 F. 2d 155, 157–158 (C. A. 2). Since petitioner did not object to the omission of such an instruction before the jury retired to consider its verdict, he is foreclosed from raising it on appeal.[1]

2. Petitioner contends that the rebuttal evidence showing his possession of narcotics kits was intro-

[1] F. R. Crim. P., Rule 30: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

duced solely to impeach him as a witness by contradicting his testimony, on cross-examination, on a collateral matter (Pet. 14–21). The contention misconceives the purpose of the evidence. It was offered in rebuttal not only of petitioner's testimony on cross-examination (denying possession of the kits) but, more importantly, of his testimony on direct examination that he had not used narcotics for two years. Nor did it involve a collateral matter. The very theory of the defense was that petitioner was not a narcotics user and therefore would have had no reason to import heroin for himself, thereby adding credence to his claim that the heroin was a "sample" he was bringing to the agents. When that issue had been introduced by the defense, evidence tending to show that petitioner was in fact a narcotics user and thus had a use for the heroin he was importing was obviously relevant to disprove petitioner's explanation of the importation. To dispel any prejudice from the fact that the evidence tended to show commission of another crime, the court cautioned the jury that "The defendant is not on trial for any act not alleged in the indictment" (R. 160). Petitioner neither objected to this instruction nor requested another.

3. Petitioner contends that Government Exhibit 2, the package of heroin taken from him upon his arrest, was not properly identified (Pet. 21–22). The claim is not substantiated by the record. Every moment from the time the package was taken from petitioner to the time it was introduced into evidence was accounted for in the testimony of the persons who handled it (see the Statement, *supra*, pp. 6–7). Their

testimony was a complete account of what happened to the package and, even though no such issue was raised at the trial, fully negatives any possibility of alteration of the contents of the package.

4. At the time of petitioner's first offense and conviction under the Narcotic Drugs Import and Export Act, in 1953, that Act provided that "For a second offense, the offender shall be * * * imprisoned not less than five or more than ten years" (§ 2 (c), *supra*, p. 2). Effective July 19, 1956—*before* commission of the offense for which petitioner was convicted below—the second-offender provision was amended to prescribe imprisonment for "not less than ten or more than forty years." (§ 2 (c), as amended by § 105, Narcotic Control Act of 1956, *supra*, pp. 2–3).[2] Petitioner, who was sentenced to ten years, contends that the amendment was, as to him, an *ex post facto* law in that it increased the *minimum* punishment for a second offense after he had already been convicted of the first offense, thus increasing the onerous consequences of the first conviction.[3] It is settled, however,

[2] The 1956 amendments also made the following changes applicable to persons convicted under the Narcotic Drugs Import and Export Act: (1) persons so convicted were made ineligible for parole under 18 U. S. C. 4202, though not for good-time allowances under 18 U. S. C. 4161 (26 U. S. C. (Supp. V) 7237 (d)); (2) the sentence prescribed for first offenders, formerly 2 to 5 years, was increased to 5 to 20 years (§ 2 (c), *supra*, pp. 2–3); the prohibition against probation, previously applicable only to second offenders, was extended to first offenders (26 U. S. C. (Supp. V) 7237 (d)).

[3] It should be noted, however, that petitioner's ten-year sentence was within the maximum authorized for a second offender even before the 1956 amendments, and was also within the maximum authorized for a *first* offender after the 1956 amendments (§ 2 (c), *supra*, pp. 2–3).

that a statute which imposes more severe penalties for future offenses upon persons who have been convicted of other crimes antedating its enactment is not *ex post facto*. "The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U. S. 728, 732; see also *McDonald* v. *Massachusetts*, 180 U. S. 311; *Wilson* v. *United States*, 205 F. 2d 567, 210 F. 2d 245 (C. A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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